Supreme Court, U.S.
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No. 97-206

In The

Supreme Court of the United States

October Term, 1996

ADDISON JACK WORTHINGTON,

Petitioner,

versus

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT AND RONALD L. POWELL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court For The State Of Louisiana

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

The State of Louisiana, Department of Transportation and Development, respectfully represents:

STATEMENT OF THE CASE

Petitioner herein seeks discretionary review by this Court of the Louisiana State Supreme Court denial of writs below. Petitioner sought the discretionary review by the Louisiana Supreme Court to review the decision of the Louisiana Second Circuit Court of Appeal wherein that court reversed a jury verdict which had found the State of Louisiana, Department of Transportation and Development, to be comparatively at fault in causing injury to the petitioner.

The State of Louisiana, Department of Transportation and Development, shows that for the reasons set forth herein this Court should not grant petitioner's writ application.

A. STATEMENT OF FACTS

On Friday afternoon, April 30, 1993, petitioner Addison Jack Worthington and five other individuals had been drinking for a number of hours at a pool hall/convenience store located on Highway 552, near Downsville, Louisiana, leaving as it was closing for the evening.

As they were leaving the establishment, the driver, Ronnie Powell, was asked by the owner if he was driving. He assured her he was not, that Worthington was.

In the parking lot there was an extended "discussion" as to who should drive, others either offering to drive or being volunteered, with the decisions being made based on their respective assessments as to how much each had to drink. They accounted for the accompanying shouting during this decision making process as being necessary because one of the group was hard of hearing.

One of the participants objected to Worthington driving, alleging that he had been drinking prior to the trip to the pool hall/convenience store. Another offered to drive but another refused to ride in the car if he drove. Powell, apparently tiring of the discussion, made a command decision that he was going to drive.

Approximately a half-mile down the road, the vehicle stopped to allow the passengers to disembark and relieve themselves. They reentered the vehicle and continued.

After another half-mile, Powell entered a curve. He testified that as he entered the curve, another vehicle's lights blinded him and he edged off the side of the road. For approximately 300 feet, the vehicle straddled the shoulder, with the right tires off the roadway and the left tires on the paved portion. As the vehicle approached a steeper portion of the roadside area near a culvert, it flipped, ejecting four of the six occupants.

B. PROCEDURAL HISTORY OF THE CASE

Worthington and four of the five occupants, including the driver, filed suit against the State of Louisiana, Department of Transportation and Development, alleging

that the accident was caused by the failure of the State to properly design and maintain the highway.

Trial by jury was requested by the plaintiffs and by the State.

At the conclusion of the trial, the jury determined that the State was equally at fault with the driver in causing the accident and further found that each of the occupants was ten percent (10%) at fault for their own injuries.

The State requested a Judgment Notwithstanding the Verdict, or alternatively, a new trial. The trial judge denied these requests and the State appealed to the Louisiana Second Circuit Court of Appeal.

On October 30, 1996, the Louisiana Second Circuit Court of Appeal, issued its opinion that the jury was "clearly wrong" in finding that the State was liable and reversed, amending the trial court judgment to find that the driver was solely at fault.

Petitioner sought writs of certiorari with the Louisiana Supreme Court, which were denied on January 31, 1997. He then sought a rehearing of the writ denial and further requested the recusal of Justice Chet D. Traylor, alleging that Justice Traylor had acted improperly and had inappropriately influenced his fellow justices.

This rehearing/recusal was denied by the Louisiana Supreme Court on March 21, 1997.

On April 24, 1997, the petitioner filed in this Court a Motion for Extension of Time Within Which to Apply for

Writs of Certiorari. This was denied by Justice Scalia on April 29, 1997.

This application for writ was filed, noted by this Court as postmarked June 19, 1997, and received on June 23, 1997. The application was returned to the petitioner for failure to comply with the rules of this Court.

The writ application was subsequently placed on the docket August 5, 1997.

SUMMARY OF ARGUMENTS FOR DENYING WRIT

This writ application was untimely filed and does not present any compelling reasons required for its consideration. The jury was "clearly wrong" in its determination that the accident giving rise to the petitioner's injuries was the result of anything other than the intoxication and negligence of the driver. The appellate court had the constitutional duty to correct that error. Petitioner was denied a discretionary review in the Louisiana Supreme Court. He then improperly sought a rehearing of the writ denial and sought for the first time to recuse Louisiana Supreme Court Justice Chet D. Traylor, alleging that Justice Traylor bore his attorney personal animosity and acted in such a way to improperly influence his fellow justices. The Louisiana Supreme Court correctly rejected both requests. Petitioner now asks this Court to consider the constitutionality of appellate review of both facts and law in the Louisiana courts of appeal and the propriety of Justice Traylor's presence on the panel denying writs, issues that were not presented in the courts below.

ARGUMENT

1. This application for writ of certiorari was not timely filed.

Rule 13, Supreme Court Rules, provides in part:

> "1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.
>
> 2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, e.g., 28 U.S.C. s 2101(c).
>
> 3. . . . if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing . . . "[1]

Petitioner filed this writ application on June 19, 1997, 139 days after the January 31, 1997 entry of the order denying writs in the Louisiana Supreme Court.

This proposed filing outside of the 90 days is based on petitioner's suggestion to this Court that it is timely

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[1] See Appendix for complete rule.

filed as it was filed on the 90th day after the denial for rehearing of the writ denial on March 21, 1997.

However, the petitioner had no right to request a rehearing in the Louisiana Supreme Court of his writ denial. Accordingly, the application for rehearing was of no effect and cannot be used to extend the time for filing.

Rule IX, Section 6, Louisiana Supreme Court Rules, provides that: "An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari . . . "[2] See *Posey v. Fabre*, 373 So.2d 535 (La. 1979); *State v. Phillips*, 350 So.2d 903 (La. 1977); *State v. Sanders*, 337 So.2d 1131(La. 1976); *Dennis v. Henderson*, 228 So.2d 484 (La. 1969); *State v. Beamish*, 19 So.2d 258 (La. 1944); *Blaize v. Hayes*, 15 So.2d 228 (La. 1943).

Louisiana Code of Civil Procedure (La. C.C.P.) article 2166 D[3] states that a judgment of a court of appeal becomes final when the state supreme court denies the application for certiorari. See, i.e., *Simon v. Fasig-Tipton Company of New York*, 574 So.2d 554 (La. App. 3rd Cir. 1991), *writ denied*, 580 So.2d 381 (La. 1991), *certiorari denied*, 502 U.S. 983, 112 S.Ct. 588, 116 L.Ed.2d 613 (U.S. La. 1991).

A petition for certiorari in a civil case from a state court must be filed within 90 days of the entry of the

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[2] See Appendix for complete text of rule.

[3] See Appendix for complete text of statute.

judgment complained of below. *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 115 S.Ct. 537, 130 L.Ed.2d 439 (U.S. D.C. 1994).

"This 90-day limit is mandatory and jurisdictional." *Federal Election Commission v. NRA Political Victory Fund, supra*, at 90, at 539; *Missouri v. Jenkins*, 495 U.S. 33, 45, 110 S.Ct. 1651, 1660, 109 L.Ed.2d 31 (U.S. Mo. 1990).

2. This writ application seeks to raise for the first time in this court issues not presented below or not properly raised below.

a. Denial of Right to Civil Jury Trial

In this writ application, petitioner argues that the Louisiana Second Circuit Court of Appeal finding that the jury was clearly wrong in imposing any liability on the State of Louisiana, Department of Transportation and Development, was in some way a denial of a constitutional right to civil trial by jury. This issue was not raised in his application for writs to the Louisiana Supreme Court and, as such, should not be considered by this Court. *Heller v. Doe*, 509 U.S. 312, 113 S.Ct. 2637, 125 L.Ed.2d 257 (U.S. Ken. 1993) and *Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (U.S. Wis. 1985).

b. Misconduct by Louisiana Supreme Court Justice Chet D. Traylor

In a manner consistent with petitioner's constant attempt to avoid responsibility for his own actions, he has raised before this Court allegations of gross misconduct

on the part of Louisiana Supreme Court Justice Chet D. Traylor.

Petitioner sought to raise this issue for the first time in his improper request for rehearing of the Louisiana Supreme Court's denial of his writ application. In denying the application, the court characterized the rehearing request as a motion to recuse and stated that it was not timely filed.

Petitioner filed no written motion seeking the recusal of Justice Traylor. Motions to recuse a justice of the supreme court must be in writing. L.S.A. C.C.P. Art. 159.[4] See, i.e., *Mayeaux v. Christakis*, 619 So.2d 93 (La. App. 5th Cir. 1993)

Further, such a motion to recuse cannot be raised after the fact. *Rathe v. Jefferson Parish School Board*, 19 So.2d 153 (La. 1944). Petitioner was aware of all the facts upon which he based his scurrilous allegations of impropriety prior to the court's consideration of his original writ application.

(Even if the request for rehearing was authorized, the supreme court would not have considered it as rehearings are generally not granted to consider issues raised for first time in an application for rehearing. See, i.e., *Rodrigue v. LeGros*, 563 So.2d 248 (La. 1990))

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[4] See Appendix for complete text of statute.

3. The issues presented by petitioner in his writ application do not warrant review by this Court as they do not involve any of the compelling reasons required.

Rule 10, Supreme Court Rules, provides that:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion and that a petition for a writ of certiorari will be granted only for compelling reasons."

It further provides that:

> "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[5]

The principal purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. See, i.e., *Braxton v. U.S.*, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (U.S. Md. 1991). No such purpose presents itself to this Court in this application.

a. Seventh Amendment Claims by Petitioner

Initially, it should be noted that the Seventh Amendment right to a civil jury trial has not been extended to the state judicial system.

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[5] See Appendix for complete text of rule.

As stated in *Blanchard v. City Parish of East Baton Rouge*, 95-2011 (La. App. 1st Cir. 4/30/96), 674 So.2d 317, *writ denied*, 96-1511 (La. 9/20/96), 679 So. 2d 443:

> "The Bill of Rights, which includes the seventh amendment right to jury trial, is directly applicable only to the federal government. The rights become applicable to the states when the United States Supreme Court, through a process of "selective" incorporation, determines that each is required by the fourteenth amendment's guarantee of due process. *Rudolph v. Massachusetts Bay Insurance Co.*, 472 So.2d 901, 903 (La.1985). Thus, whether the right to a civil jury trial must be afforded by a state to its citizens, at least insofar as mandated by the United States Constitution, is dependent on whether the United States Supreme Court considers the civil jury trial an essential aspect of due process.
>
> "The United States Supreme Court, whose authority with respect to, and interpretation of, the United States Constitution is preeminent, has already decided that the right to jury trials in civil cases is not so fundamental to the American system of justice as to be required of state courts by the due process clause of the fourteenth amendment. *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La.1972), *affirmed*, 409 U.S. 943, 93 S.Ct. 289, 34 L.Ed.2d 214 (1972); *Rudolph v. Massachusetts Bay Insurance Co.*, 472 So.2d at 902. As a result, the seventh amendment is one of the few rights contained in the Bill of Rights which has not been made applicable to the states. *Rudolph v. Massachusetts Bay Insurance Co.*, 472 So.2d at 903. See also *Carter v. City of New Orleans*, 327 So.2d 488, 490 (La. App. 4th Cir.1976); *Heindel v. Harley Davidson Motorcycles*,

467 So.2d 641, 645 (La. App. 4th Cir.), *reversed, order striking jury reinstated*, 477 So.2d 695 (La.1985)." at 319.

See, also, *Adams v. City of Baton Rouge*, 95-2515 (La. App. 1st Cir. 4/30/96), 673 So.2d 624, *writ denied*, 96-1491 (La. 9/20/96), 679 So.2d 439.

b. Appellate Review of Facts and Law

The Louisiana Constitution provides that the appellate jurisdiction of a court of appeal extends to law and facts. La. Const. 1974, Art. V, § 10(B).[6]

This Court has long recognized this approach by Louisiana courts. See, i.e., *Lumbermen's Mutual Casualty Company v. Elbert*, 348 U.S. 48, 75 S.Ct. 151, 99 L.Ed. 59 (U.S. La. 1954): "In Louisiana, appellate review in civil cases extends to both matters of law and fact." at 53, 155.

This provision, resulting from Louisiana's history as a civilian jurisdiction, has been interpreted as giving an appellate court the power to decide factual issues de novo. The exercise of this power is limited, however, by the jurisprudential rule of practice that a trial court's factual findings will not be upset unless they are manifestly erroneous or clearly wrong. Nevertheless, when the court of appeal finds that a reversible error of law or manifest error of material fact was made in the trial court, it is required, whenever possible, to redetermine the facts de novo from the entire record and render a judgment on

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[6] See Appendix for complete text.

the merits. *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252, pp. 3-4 (La. 2/20/95), 650 So.2d 742, 745; *Young v. Logue*, 94-0585 (La. App. 4th Cir. 5/16/95), 660 So.2d 32, 41, *writ denied*, 95-2575 (La. 12/15/95), 664 So.2d 443.

As such, the appellate courts of the state need not defer entirely to the fact finder's determinations; rather, they are empowered and are under a constitutional mandate to review the record in its entirety. See La. Const. art. V, § 10(B); *Ferrell*, 94-1252, at p. 5, 650 So.2d at 746; *Young*, 94-0585, at p. 9, 660 So. 2d at 32.

Following such review, should the appellate court conclude that the fact finder's determinations are clearly wrong or manifestly erroneous, they must reverse the erroneous determinations, conduct an independent review of the record, and render a just and proper decision on the evidence adduced at trial. See L.S.A. C.C.P. Art. 2164[7]; *Gonzales v. Xerox Corp.*, 320 So.2d 163, 165 (La.1975); *Young*, 94-0585, at p. 9, 660 So. 2d at 32; *Holt v. Aetna Casualty & Surety Co.*, 28,450 (La. App. 2nd Cir. 9/3/96), 680 So.2d 117, *writ denied*, 96-2515 (La. 12/6/96), 684 So.2d 937; *Haworth v. L'Hoste*, 95-0714 (La. App. 4th Cir. 11/30/95), 664 So. 2d 1335, *writ denied*, 96-0408 (La. 3/29/96), 670 So.2d 1235; and *Olivier v. Allstate Insurance Co.*, 95-306 (La. App. 3rd Cir. 10/4/95), 663 So.2d 207.

In *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. LA., 1972), *affirmed by Mayes v. Ellis*, 409 U.S. 943, 93 S.Ct. 289, 34 L.Ed.2d 214 (U.S. La., 1972), and *affirmed by Hill v. McKeithen*, 409 U.S. 943, 93 S.Ct. 290, 34 L.Ed.2d 214 (U.S. La., 1972), and *affirmed by Davis v. Edwards*, 409 U.S. 1098,

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[7] See Appendix for complete text of statute.

93 S.Ct. 908, 34 L.Ed.2d 679 (U.S. La., 1973), Judge J. Minor Wisdom noted that assuming the right to a civil jury trial is required by due process:

> " . . . the Louisiana scheme does not destroy that right, but modifies it in accordance with fair procedures many of which are analogous to procedures established in the Federal Rules of Civil Procedure." at 1045.

Judge Wisdom went on to note:

> "[I]t suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. . . . In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard. (*Citation omitted*)
>
> "B. The soundness of this federal principle would seem to be peculiarly applicable to procedure in Louisiana. The law of this state is unique. Nevertheless, its lawmakers, legislative and judicial, have managed to work out compromise procedures compatible with Louisiana's civilian heritage and with the Anglo-American concept of due process. There is appellate review on the facts as well as on the law, but it is subject to the requirement that factual findings of a trial court or the verdict of a jury should be

> disturbed only when they are manifestly erroneous. (*Citations omitted*)
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> * * *
>
> "If the kind of appellate review of the facts that exists in Louisiana is unconstitutional, then the Supreme Court should take a second look at the constitutionality of the Federal Rules." at 1047

Such state appellate court review of factual determinations have consistently been noted by this Court to be satisfactory. See, i.e., *Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. 2211, 135 L.Ed.2d 659, 64 USLW 4607 (U.S. N.Y., 1996); and *Parratt v. Taylor*, 451 U.S. 527, 542, 101 S.Ct. 1908, 1916, 68 L.Ed.2d. 420 (U.S. Neb. 1981).

Similarly, had this petitioner sought to collaterally attack the appellate reversal for the same reasons presented in his application before this Court, his action would have been summarily dismissed.

In *Cheramie v. Tucker*, 493 F.2d 586 (5th Cir.(La.), 1974, *certiorari denied*, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d. 107 (U.S. La. 1974), the Fifth Circuit noted:

> "The substance of the appellant's claim is not the unconstitutionality of the Louisiana system but the alleged unconstitutional application of the system to his case. In essence he contends that the state court merely paid 'lip service' to the doctrine of manifest error which is alleged to save the constitutionality of the Louisiana system. (*Footnote omitted*) To reach this issue it is necessary to re-examine the validity of the state court judgment . . .

* * *

"The appellant has had a full and fair opportunity to litigate the issue of the Highway Department's negligence. For this court to grant the appellant his requested relief it would be necessary to reexamine the negligence issue. This we decline to do. It does not appear to be appropriate under any theory advanced by the appellant for this court to review the decision of the appellate courts of Louisiana in a negligence case." at 589.

In accord, see *Collins v. Collins*, 597 F. Supp. 33 (N.D. Ga. 1984):

"By whatever name it is called, however, the principle remains the same. Federal courts are not in the business of hearing attacks on state court judgments where the state has provided an opportunity for appellate review to satisfy the requirements of due process." at 39.

4. The Second Circuit Court of Appeal was correct in finding that the jury was "clearly wrong" in finding the State of Louisiana responsible for the accident

As the Second Circuit Court of Appeal stated, the finding that the State was in anyway responsible for this accident was "clearly wrong" for the following reasons:

There was no defect in the roadway to cause this vehicle to leave the road;

There was no deviation from any applicable design or construction standards;

There was no evidence that this accident was caused or contributed to by any failure to properly maintain the roadway or its shoulders; and

The sole cause of this accident was the intoxication and negligence of the driver.

Contrary to the assertions to the petitioner in his writ application, there was no testimony that any drop-off existed in this area that created an unreasonable risk of harm or that played any role in this accident.

Indeed, the petitioner's expert Duaine Evans testified that in his opinion this accident was caused by the failure of the State to meet guideline requirements for shoulder, shoulder slope and guardrails, the driver's intoxication, and the driver's speed. (R 445). There was absolutely not one word said by him as to any drop-off, let alone any dangerous condition. The only testimony as to the existence of any drop-off was made by the State's expert when he was questioned about Mr. Evan's pre-trial deposition testimony. In that deposition, Mr. Evan's said that he had found a $3^5/_8$" drop-off between the paved portion and the adjoining gravel area at only one point but that it had not played any role in the accident.

For petitioner's counsel to now claim that this accident was occasioned by the driver inadvertently encountering a dangerous drop-off causing him to lose control of the vehicle is a total misstatement of the facts and testimony and either indicates a failure to correctly state the facts and testimony or an unwillingness to do so.

At trial, there was no testimony that the driver of the vehicle left the roadway for any reason other than his own negligence.

This highway was testified to by DOTD Road Design Engineer Administrator Kent Israel as having come into the state system prior to 1936. (R 821). It was first hard surfaced in 1948-49 and again subjected to a surface treatment in 1959. Both of these actions were considered by DOTD personnel as having been overlay projects, not new construction or major reconstruction. (R 822).

The State of Louisiana did not adopt design or construction standards for its highways until 1955. (R 821) Even if they had been in effect in 1948, they would not have been applicable to the hard surfacing done in that year as it was not considered by DOTD to be either new construction or major reconstruction. These standards were not applicable to overlay projects. The state did not adopt overlay standards until 1974. (R 821).

Further, the plans for the 1948-1950 hard surfacing and the 1959 surface treatment called for the maintenance of existing shoulders and slope, not construction of new or additional shoulders or an alteration in the slope of the adjacent embankments. The testimony of the District Maintenance Engineer (Don Tolar) was that the duty of the DOTD was to maintain the existing shoulders and slope and that it had done so. There was no contrary testimony.

Evans opined that the shoulder width constituted a defect because it was not built in accordance with the design standards[8] in effect at the time the road was hard

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[8] The standards referred to by Mr. Evans and the other witnesses were standards as to new highway construction or major reconstruction adopted by the state legislature in 1955

surfaced, which Mr. Evans had determined through his own inquiry to have been in 1958 and 1959. (R 453-454).

Likewise, in his opinion, the shoulder slope at six (6') and eight (8') feet from the roadway was excessive because it had not been built in accord with those same standards. (R 462).

Regarding the lack of a guardrail at the site of the culvert, Mr. Evans acknowledged that the referred to standards did not address the need for a guardrail, but that those standards would have required a wider shoulder, alleviating any danger posed by the lack of a guardrail. (R 469).

Mr. Evans testified that in his opinion the State had failed in its responsibility to meet design criteria, or if it had properly designed the shoulders and embankments, it had failed to maintain them in accordance with that criteria. Mr. Evans acknowledged at trial that the 1955 DOTD standards (and 1954 AAHSTO standards regarding embankment slope) would not be applicable to a 1959 overlay and that if the roadway was hard surfaced prior to 1954/1955 those standards would not be applicable. He further testified that the state was not required to reconstruct the highway to meet any change in the standards. (R 462-463).

Unfortunately, Mr. Evans discovered at trial for the first time that Highway 552 had originally been Highway 477 and had been renumbered 552 in the early 1950's. The

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and the guidelines the American Association of State Highway and Transportation Officials formulated in 1954. The state adopted overlay standards in 1974. (R 821).

road (as Highway 477) had initially been hard surfaced in 1948 and 1949. On learning at trial that the road had been first hard surfaced in 1948, he acknowledged the inapplicability of the 1955 and 1954 standards but that he believed that there were 1946 guidelines that were applicable. However, he had not researched the case in regards to any 1946 guidelines. (R 479). (The inapplicability of any 1946 guidelines, which were never adopted by the state, was established by Mr. Israel's testimony.) (R 823-824).

Mr. Evans acknowledged that the 1948 plans called for a one (1') foot paved shoulder and in his inspection of the roadway he did not notice any places of less than a one (1') foot paved shoulder. (R 478).

He further acknowledged that at a distance of four feet (4') to six feet (6') from the paved surface the slope was recoverable for some approximately three hundred feet (300') from the spot where the driver left the paved surface and that it was only at or near the drainage culvert where the car began to flip that the slope became unrecoverable. (R 465-466).

The importance of that testimony is that by all the evidence considered the car did not stray from a distance of four feet (4') to six feet (6') until it reached that area close to the ditch. That is, that for some three hundred feet (300') or so it had traveled down the side of the roadway, with the tires on the driver's side of the car on the roadway and the passenger side tires on the area adjacent to the paved surface. The plaintiffs' own expert testified that the slope in this area was recoverable. Combined with the lack of evidence of any defect in the area

adjacent to the paved area, there was no reason why a sober, non-speeding driver could not have completely reentered the paved roadway without problem at any point prior to encountering the ditch area.

Dr. Joseph Blaschke testified as an expert in highway design, traffic engineering, and accident reconstruction for the State. His testimony supported that of Mr. Israel as to the applicable standards. He further testified that there were no defects in the shoulder area based upon his review of the accident report, the deposition testimony of Mr. Evans and his own inspection of the accident site. (R 834-836).

In short, there was no evidence that the State of Louisiana was required to have any more than a one foot (1') paved shoulder on this highway, there was no evidence that the area adjacent to the roadway upon which the vehicle traveled was deficient in any way, there was no evidence that the State of Louisiana failed to properly maintain the roadway or the adjacent area, or that any failure to maintain the area adjacent to the roadway created any defect that in anyway contributed to this accident.

As the Second Circuit Court of Appeals correctly noted, the jury erred in not finding the accident to have been solely the fault of Ronnie Powell.

The testimony clearly established that the driver was intoxicated and speeding and that caused him to leave the road and not be able to recover:

> *Ms. Joy Frith testified that she told Powell that he should not drive, he agreed, and that if she had*

known he was going to drive she would have called his mother or wife to talk him out of it. (R 483, 488).

Billy Harold Rogers testified that he spent at least thirty (30) minutes with Powell, waiting on medical assistance. During that period of time the driver smelled strongly of alcohol, had slurred speech, and Mr. Rogers was of the opinion that Powell was drunk. Powell initially denied to Mr. Rogers that he had been driving, saying that Ms. Joy had told him he was too drunk to drive so he knew he was not driving at the time of the accident. (R 752).

The plaintiffs all acknowledged that there was an extended "discussion" as to who should drive, with other plaintiffs either offering to drive or being volunteered, with the decisions being made based on their respective assessments as to how much each had to drink. They accounted for the accompanying shouting during this decision making process as being necessary because another plaintiff was hard of hearing. (R 358-359, 510, 566, 588, 624).

The State Trooper testified that in her opinion the vehicle was traveling at a speed of 75 to 80 MPH when it left the highway. (R 433).

Mr. Evans, the plaintiffs' own expert, testified that by his calculations the vehicle was going at least 55 MPH and possibly 65 MPH when it left the roadway. (R 448).

Dr. Blaschke, the expert called by the state, testified that the speed of the vehicle was between 60 and 80 MPH when it left the roadway. (R 830).

The driver's blood alcohol level two hours after the accident was .15 and was estimated back by Dr. David Rhone to have been .19 at the time of the accident. (Rhone Deposition Testimony read into evidence)

> *A person with any level of alcohol above .04 would be impaired and that this driver would have been exhibiting signs of impairment that would have been obvious to individuals paying attention. (Rhone Deposition Testimony read into evidence)* (R 831).

It is beyond doubt that the intoxication of the driver and the excessive speed were the sole causes of this accident. The assertions of the plaintiffs to the contrary are unsubstantiated by the evidence, defy common sense, and are beyond reason.

It should also be noted that the Second Circuit Court of Appeals did not consider one issue raised on appeal by the State.

As evidenced at trial, the driver and all five passengers had been drinking. The state sought to introduce as evidence that the driver Ronnie Powell had two previous pleas of guilty to Driving While Intoxicated and a plea of guilty to Disturbing the Peace – Intoxication, that the plaintiff Danny Powell had four previous pleas of guilty to Driving While Intoxicated, that the plaintiff Addison Jack Worthington had a previous plea of guilty to Driving While Intoxicated, and that the plaintiff Tony Dean Mullins had a previous plea of guilty to Driving While Intoxicated.

Additionally, Ronnie Powell was charged with and entered a plea of guilty to the offenses of Driving While Intoxicated and Negligent Injury arising out of the accident involved in this lawsuit.

Prior to trial, the plaintiffs filed a Motion in Limine, opposing the introduction of any of the pleas of guilty. The District Court in response ruled that the pleas of

guilty to the Driving While Intoxicated and Negligent Injury offenses arising out of the accident were not excluded but that the evidence of the other nine pleas of guilty by the plaintiffs were not admissible as they were too prejudicial.

The State of Louisiana believes that these pleas were admissible and probative of the grossly negligent actions of the driver, the knowledge by all the plaintiffs of the risks of harm involved in their conduct, and the conscious indifference of all the plaintiffs to the consequences of their actions. Further, it was necessary that the jury hear this evidence to appropriately judge the liability of all parties. Should this Court grant writs, the State would reargue this issue for consideration.

CONCLUSION

For the foregoing reasons, review by this Court is not necessary or appropriate and the writ of certiorari should not issue.

Respectfully submitted,

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APPENDIX

UNITED STATES SUPREME COURT RULE 10

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

UNITED STATES SUPREME COURT RULE 13

Rule 13. Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, e.g., 28 U.S.C. s 2101(c).

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. A suggestion made to a United States court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of this Rule unless so treated by the United States court of appeals.

4. A cross-petition for a writ of certiorari is timely when it is filed with the Clerk as provided in paragraphs 1, 3, and 5 of this Rule, or in Rule 12.5. However, a conditional cross-petition (which except for Rule 12.5 would be untimely) will not be granted unless another party's timely petition for a writ of certiorari is granted.

5. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be received by the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances. For the time and manner of presenting the application, see Rules 21, 22, 30, and 33.2. An application to extend the time to file a petition for a writ of certiorari is not favored.

LOUISIANA SUPREME COURT RULE IX

RULE IX. REHEARINGS

Section 1. An application for rehearing must be filed with the clerk on or before the fourteenth calendar day after the mailing of the notice of judgment, and no extension of time therefor will be granted. Nine copies of the application shall be filed with the original. A copy of the application shall be mailed or delivered to opposing counsel.

Section 2. An application for rehearing properly mailed on or before the last day of the delay shall be deemed timely filed. If the application is received by mail on the first legal day following the expiration of the delay, there shall be a rebuttable presumption that it was timely filed. In all cases where the presumption does not apply, the timeliness of the mailing shall be shown only by an official United States postmark or by official receipt or certificate from the United States Postal Service made at the time of mailing which indicates the date thereof. For the purpose of this rule, the term "by mail" applies only to the United States Postal Service.

Applications forwarded by private delivery or courier service shall be deemed timely filed only if received by the clerk on or before the last day of the delay for filing.

Section 3. If the applicant for rehearing desires further time for filing of brief in support of his application, he shall request additional time in his application and the court may grant or refuse such delay in its discretion.

Section 4. When a rehearing is granted, the case may be specially fixed for argument. When called, the case may be argued orally, on the briefs already filed, with such additional or supplemental briefs as the parties may see fit to file before the argument and resubmission of the case on rehearing. When a rehearing is granted, the court may order it submitted on the briefs previously filed and such supplemental briefs as the parties may wish to file.

Section 5. When a case has been decided on rehearing, another application for rehearing will not be considered unless the applicant has not theretofore applied for and been granted a rehearing or unless the court, in deciding the case on rehearing, has expressly reserved to the unsuccessful party or parties the right to apply for another rehearing.

Section 6. An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ, or when the judgment of this court is merely overruling a motion to dismiss an appeal or a motion to recall or rescind a rule nisi, or when, for any reason, the judgment has not finally disposed of the case in this court, or when an election case has been decided as provided by Rule X, Section 5(c).

LOUISIANA CONSTITUTION, 1974, ARTICLE V, § 10

§ 10. Courts of Appeal; Jurisdiction

Section 10. (A) Jurisdiction. Except as otherwise provided by this constitution, a court of appeal has appellate jurisdiction of (1) all civil matters, including direct review of administrative agency determinations in worker's compensation matters as heretofore or hereafter provided by law, (2) all matters appealed from family and juvenile courts, and (3) all criminal cases triable by a jury, except as provided in Section 5, Paragraph (D)(2) of this Article. It has supervisory jurisdiction over cases which arise within its circuit.

(B) Scope of Review. Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts. In the review of an administrative agency determination in a worker's compensation matter, a court of appeal may render judgment as provided by law, or, in the interest of justice, remand the matter to the administrative agency for further proceedings. In criminal cases its appellate jurisdiction extends only to questions of law.

(c) Other Criminal Matters. In all criminal cases not provided for in Paragraph (D)(2) or Paragraph (E) of Section 5 or Paragraph (A)(3) of this Section, a defendant has a right of appeal or review, as provided by law.

LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 159

Art. 159. Recusation of supreme court justice

When a written motion is filed to recuse a justice of the supreme court, he may recuse himself or the motion shall be heard by the other justices of the court.

When a justice of the supreme court recuses himself, or is recused, the court may (1) have the cause argued before and disposed of by the other justices, or (2) appoint a judge of a district court or a court of appeal having the qualifications of a justice of the supreme court to act for the recused justice in the hearing and disposition of the cause.

LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 2164

Art. 2164. Scope of appeal and action to be taken; costs

The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 2166

Art. 2166. Rehearing, court of appeal judgment; finality; stay

A. Within fourteen days of the mailing of the notice of the judgment and opinion of the court of appeal, a party may apply to the court of appeal for a rehearing. Within thirty days of the mailing of the notice of the judgment and opinion of the court of appeal, a party may apply to the supreme court for a writ of certiorari. The judgment of a court of appeal becomes final and definitive if neither an application to the court of appeal for rehearing nor an application to the supreme court for a writ of certiorari is timely filed.

B. If any party files a timely application to the court of appeal for a rehearing, then the time within which any other party may apply to the supreme court for a writ of certiorari shall be extended until thirty days of the mailing of the notice of a denial of rehearing.

C. If a timely application for rehearing has been filed in the court of appeal and the court of appeal denies the application, the judgment becomes final and definitive unless an application for writ of certiorari to the supreme court is filed within thirty days of the mailing of the notice of a denial of rehearing.

D. If an application for certiorari to the supreme court is timely filed, a judgment of the court of appeal becomes final and definitive when the supreme court denies the application for certiorari. The supreme court may stay the execution of the judgment of the court of

appeal pending a timely application for certiorari or an appeal to the United States Supreme Court.